

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





74-1171

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P/S

IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

APPEAL No. 74-1171

AFFILIATED HOSPITAL PRODUCTS, INC.,  
*Appellant,*

v.

MERDEL GAME MANUFACTURING COMPANY,  
WM. RICHMAN ASSOCIATES, LTD.,  
BERNARD CAHN,  
*Appellees.*

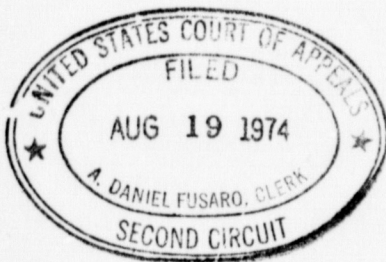
APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

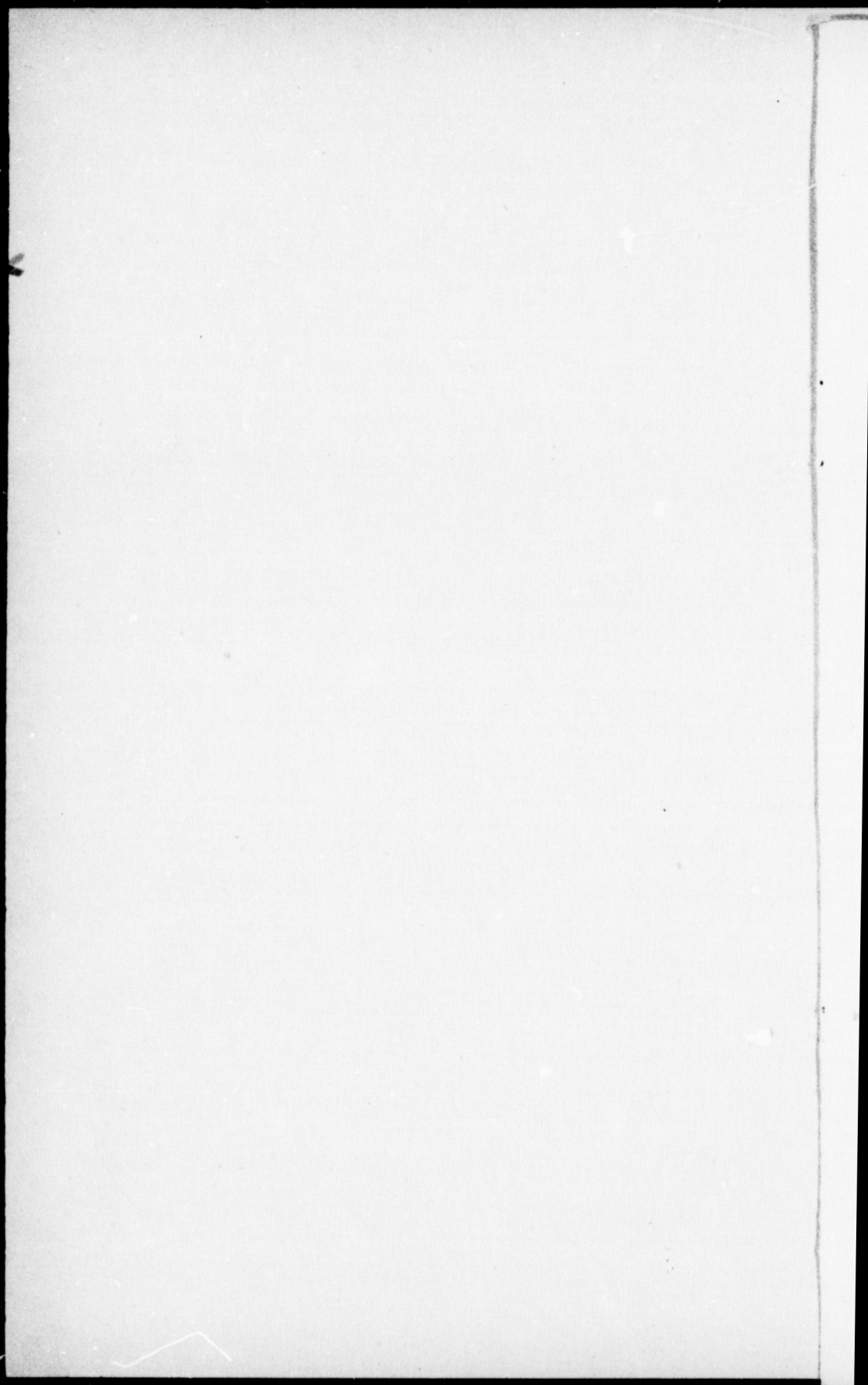
**BRIEF OF THE APPELLANT**  
**AFFILIATED HOSPITAL PRODUCTS, INC.**

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**BRIEF OF THE APPELLANT  
AFFILIATED HOSPITAL PRODUCTS, INC.**

---

**I. PRELIMINARY STATEMENT**

This is an appeal from the United States District Court for the Southern District of New York, the Honorable Harold R. Tyler, Jr., District Judge. The opinion below is unreported, but is reproduced in the Appendix [App. 221-48].

**II. STATEMENT OF THE ISSUES PRESENTED  
FOR REVIEW**

**A. *The Infringement of the Trademark "CARROM"***

1. The District Court erred in not distinguishing between the basic concepts of *res judicata* and collateral estoppel.

2. The District Court erred in holding that a trademark infringement action is barred by a prior judgment, where the infringing acts occurred after the date of the prior judgment and the prior judgment involved no findings of fact on which to base the doctrine of collateral estoppel.

3. The District Court erred in failing to determine that, in a trademark infringement action, a prior agreement between the parties must be pleaded and proved as an affirmative defense to have any effect on the action.

4. The District Court erred in failing to determine that, in a trademark infringement action, a prior agreement between the trademark owner and the trademark infringer is no defense where the infringing activity occurred after the date of the agreement and was not permitted by the agreement.

5. The District Court erred in failing to determine that, in a trademark infringement action, a prior agreement between the trademark owner and the trademark infringer is not a viable defense where the infringing activity occurred after the date of the agreement and the infringer had lost its right to rely on the agreement by breach of its terms.

6. The District Court erred in failing to hold the federally registered trademark "CARROM" valid.

7. The District Court erred in failing to hold the trademark CARROM infringed by featured use of the word CAROM on directly competitive products.

*B. Interpretation of a Prior Agreement Between the Trademark Owner and the Trademark Infringer*

1. The District Court erred in not determining (a) the difference between the types of infringing trademark uses



occurring prior to the date of a settlement agreement and those occurring thereafter, (b) the intent of the parties as manifested by the representatives who actually negotiated and executed the settlement agreement, and (c) a construction of the agreement based on these differences and the intent.

2. The District Court erred in failing to find the settlement agreement unenforceable by the trademark infringer, as a result of its breaches and disregard of the agreement.

C. *The Infringement of the Trademarks "KIK-IT" and "KIKIT"*

1. The District Court erred in requiring proof of actual confusion or palming off to establish infringement of a federally registered trademark, rather than proof of a likelihood of confusion as required by 15 U.S.C. § 1114(1).

2. The District Court erred in finding that the name "KICK'ER" is descriptive of and used in good faith to depict the nature of the game involved.

3. The District Court erred in failing to hold the federally registered trademarks "KIK-IT" and "KIKIT" valid.

4. The District Court erred in failing to hold the trademarks KIK-IT and KIKIT infringed by featured use of KICK'ER on directly competitive products.

D. *Copyright Infringement*

1. The District Court erred in holding that a copyright infringement action was barred by the doctrine of *res judicata* where *res judicata* was neither pleaded nor proved as an affirmative defense.

2. The District Court erred in holding that a copyright infringement action was barred by the doctrine of *res judicata* where the copyright and infringement of it were not litigated issues in the prior suit or judgment.

3. The District Court erred in holding that a copyright infringement action was barred by the statute of limitations, 17 U.S.C. § 115, where the statute of limitations was neither pleaded nor proved as an affirmative defense.

4. The District Court erred in holding that a copyright infringement action was barred by the statute of limitations, 17 U.S.C. § 115, where infringing activity has occurred within three years of bringing the action.

5. The District Court erred in holding that copyright infringement is avoided where the copier admits using the copyrighted work in preparing his own version but tries to improve the copyrighted work in substance and style.

6. The District Court erred in requiring a standard for copyright infringement of a literal, or closely paraphrased copy, where access and actual use of the copyrighted work is admitted and the works in question are substantial in length and layout.

### III. STATEMENT OF THE CASE

#### A. *The Nature of the Action*

Affiliated Hospital Products, Inc., (Affiliated), brought a civil action in the Southern District of New York against Merdel Game Manufacturing Company, (Merdel), for various acts of unfair competition, including infringement of Affiliated's registered trademark CARROM [PX-1; Exh. Vol. I, pp. 1-3], infringement of Affiliated's registered trademarks KIK-IT [PX-67; Exh. Vol. I, p. 115] and KIKIT [PX-68; Exh. Vol. I, p. 116], and copyright in-

fringement concerning a rule book sold with a Merdel gameboard. Affiliated also prayed for rescission of an earlier settlement agreement between Affiliated and Merdel which led to dismissal with prejudice of a previous action in the Western District of Michigan involving various unfair competitive practices. [PX-4; Exh. Vol. I, pp. 4-5].

Affiliated also named as Defendants William Richman Associates, Ltd., a Merdel sales representative in the New York area, and Bernard Cahn, a former Affiliated employee in the New York area, who had become associated with Richman. To simplify the issues herein, the discussion will be limited to Merdel, for Richman and Cahn stand in the shoes of Merdel insofar as the issues on appeal are concerned.

Trial was held in the present action in late May 1972 without a jury. All issues concerning the amount of damages were reserved for subsequent accounting. On April 30, 1973, the District Court rendered its opinion, and then entered final judgment late in 1973, dismissing all of Affiliated's claims for relief.

#### *B. The Parties and the Rights Involved*

Affiliated owns and operates the Carrom Division, which is engaged in the manufacturing of game products and institutional furniture. The Carrom Division is the successor, at least in the field of game products, to a line of business initially named the Ludington Novelty Co., which originated at the very end of the 19th century. Thereafter, beginning about 1900, plaintiff did business as a corporation or division with the name "Carrom" used as part of its corporate identity. [Opinion, p. 2; App. 221].

Affiliated is the owner of Trademark Registration No. 49,996 for CARROM [PX-1; Exh. Vol. I, pp. 1-3], as used

in connection with gameboards. [Opinion, p. 4; App. 223]. The registration was originally obtained on February 27, 1906 for the mark CARROMS (in a stylized form) [PX-2; omitted from Exh. Vol.], and the registration was subsequently amended to CARROM (in a block letter form). [PX-1; Exh. Vol. I, pp. 1-3]. The registration has been renewed from time to time, the last renewal being on February 27, 1967. [Opinion, p. 4; App. 223].

Affiliated has used the name CARROM since 1902 as a tradename and trademark in connection with the sale and distribution of various game products. [Opinion, p. 4; App. 223]. Indeed, the trademark CARROM has been held valid by the Courts of Appeal in both the Second and the Seventh Circuits. *Williams v. Mitchell*, 106 F. 168 (7th Cir. 1901); and *Ludington Novelty Co. v. Leonard*, 127 F. 155 (2d Cir. 1903).

In addition to the trademark CARROM, Affiliated is the owner of Trademark Registration No. 37,800, issued January 23, 1940 and renewed January 23, 1960 for KIKIT as applied to board games played with movable pieces [PX-68; Exh. Vol. I, p. 116], and the owner of Trademark Registration No. 776,546, issued September 8, 1964 for KIK-IT as applied to equipment sold as units for playing various types of board games. [PX-67; Exh. Vol. I, p. 115] [Pretrial Stipulation, ¶ 3:2 and 3:3; App. 168].

In addition to these trademarks, Affiliated is the owner of a certificate of copyright registration, Registration No. 496,140 in Class AA, for a rule book explaining how to play certain games on certain of Affiliated's gameboards. [PX-98; Exh. Vol. I, p. 117] [Pretrial Stipulation, ¶ 3:4 to 3:7; App. 168-69].

Merdel was organized by three former key employees of Affiliated's business. [Opinion, pp. 2-3; App. 222]. Merdel



began operations by marketing a wooden gameboard on which many games can be played, and which is similar to and in direct competition with a wooden gameboard manufactured by Affiliated. [Opinion, p. 3; App. 222].

Merdel's gameboard was advertised as the "'100 Play' Game Board", but the advertising also indicated, ordinarily in smaller lettering and in textual material, that its gameboard was capable of playing a game named "Carom". [See PX-101; Exh. Vol. I, pp. 154-86, for example.]. Merdel was attempting the technique of crowding a competitor's trademark and trading on it, by using it or a similar word in textual material instead of in a prominent trademark position. Indeed, two of Merdel's officers have now admitted that they know of no game playable on the Merdel gameboard which is known simply as "carom". [Transcript, p. 218; App. 109, PX-153; Exh. Vol. I, p. 294].

As a corollary to this practice, the defendant will usually protest that since he does not use the trademark in a featured or adjective position in referring to the product, he does not infringe the trademark.

Such a situation was involved in a previous trademark infringement action between Affiliated and Merdel in the Western District of Michigan, which was terminated in March 1967. In that case, counsel for Merdel stated to the Court on the first day of trial [PX-66; Exh. Vol. I, pp. 113-14, see also PX-65; Exh. Vol. I, pp. 111-12]:

"We use the word Carom not to describe our board. We call it the Hundred-Play Game Board. We do not use it in the company name. We call the company Merdel. We use it to describe one of the games we play, which we say is in the public domain; and we use it to describe an action involved in that game, which we say is a word generally in the public domain."

On the second day of trial, suit in the Western District of Michigan was settled, and Affiliated and Merdel entered into a settlement agreement. [PX-4; Exh. Vol. I, pp. 4-5].

Pursuant to the settlement, judgment was entered by consent of the parties, the judgment being a simple dismissal of all claims with prejudice. The Court, however, did not approve the settlement in any way and was not informed of its provisions.

Discovery in the present litigation revealed extensive use of the word CAROM by Merdel to describe its gameboard. Such use constituted both trademark infringement and breach of the settlement.

Most of such use was unknown to Affiliated until after discovery began. As will be discussed hereinafter, the unfair competition became worse after the settlement and even as the present litigation wore on.

Affiliated was surprised at trial when the Court mentioned Merdel's Trial Brief. [Trial Transcript, pp. 8-9; App. 43-44]. Subsequent study of the Brief proved even more surprising, since the Brief contains errors in law as well as misleading and false statements of fact. Based on some statements by the Court at trial which appear to have been taken from positions in the Trial Brief, Affiliated believes the Brief was indeed prejudicial.

Rule 5, Federal Rules of Civil Procedure, requires service of all papers on opposing counsel. "As finally adopted the rule requires service of papers, and thus assures that each party will have his own copy of all papers affecting him . . ." 1 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 201, at 758 (1960). The American Bar Association's CODE OF PROFESSIONAL RESPONSIBILITY reaffirms the

long standing rule that a lawyer shall not communicate in writing to a court without promptly serving the paper on opposing counsel (Ethical Consideration 7-35 and Disciplinary Rule 7-110 (B) (2) ).

Affiliated will not discuss the false and misleading statements here, because of the limits on this brief, but Affiliated's response after trial is copied in the Appendix. [Plaintiff's Brief In Response To Defendants' Trial Brief; App. 213-20].

#### IV. ARGUMENT

##### A. Introduction

A misconception of the doctrines of *res judicata* and collateral estoppel pervades the opinion below. The District Court even applied *res judicata* to the copyright infringement action [Opinion, p. 25-26; App. 242-43] and referred to it in denying relief for infringement of the trademark KIK-IT [PX-67; Exh. Vol. I, p. 115] [Opinion, p. 19; App. 237], when Merdel had not pleaded the doctrine as a defense to either cause of action. [Answer of Merdel to First Amended Complaint; App. 34-41].

Under Rule 8 of the Federal Rules of Civil Procedure, *res judicata* is an affirmative defense which must be made in response to the original pleading. *Res judicata* does not create a jurisdictional bar; it operates only by way of estoppel and must be pleaded by defendant as an affirmative defense. *Scholla v. Scholla*, 201 F.2d 211 (D.C. Cir.), *cert. denied*, 345 U.S. 966 (1953).

Affiliated believes that a Merdel Trial Brief below, which was not served on Affiliated, started the District Court on the wrong path. [Trial Brief; App. 188-212].

B. *The Doctrine of Res Judicata and Collateral Estoppel in Perspective*

*Res judicata* means simply that a judgment on the merits in a prior suit involving the same parties, or their privies, bars a second suit based on the same cause of action. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S.Ct. 865 (1955). Under the doctrine of collateral estoppel, such a prior judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether a different cause of action is involved, but collateral estoppel cannot arise where the prior judgment was unaccompanied by findings. *Lawlor v. National Screen Service Corp.*, *supra*; *A. D. Juilliard & Co. v Johnson*, 259 F.2d 837 (2d Cir. 1958), *cert. denied*, 359 U.S. 942 (1959).

In the case of continuing but abatable torts, or torts composed of successive acts, however, a prior judgment (on the principle of *res judicata* as distinguished from collateral estoppel) bars an action only for the harm which accrued up to the time of the first action, i.e., a new cause of action has arisen based on different acts. *Lawlor v. National Screen Service Corp.*, *supra*; RESTATEMENT OF JUDGMENTS § 62, Comments *f* and *g* (1942).

For example, if I assault a man, and judgment is entered therefor, the judgment does not bar a new action if I assault him again.

Trademark infringement involves the same principle.

Except in the remote case of a single commercial act, trademark infringement is composed of a plurality of successive acts, and is considered to be a continuing but abatable tort which gives rise to a fresh cause of action so long as the infringement persists. *Menendez v. Holt*, 128 U.S. 514, 9 S.Ct. 143 (1888); R. CALLMANN, THE LAW OF UN-



FAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 87.5, at 157 (3d ed. 1970); 87 C.J.S. *Trade-marks Trade-Names, and Unfair Competition* § 212, at 601 (1954). Each act of trademark infringement or unfair competition results in an independent actionable tort. *Midy v. Midy Laboratories, Inc.*, 77 U.S.P.Q. 429 (N.Y. Sup. Ct. 1948). With every new transaction, there is a repetition of the wrong. *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 54 S.Ct. 315 (1934).

It is not unusual to require a multiplicity of suits to terminate trademark infringements by the same infringer:

Such an unfair trade practice [trademark infringement, *inter alia*] is ordinarily not a single event but a continuous course of business conduct and the person harmed by this conduct is subjected to continuing, and often increasing, harm . . . .

[S]ince both the conduct and the harm are continuing, reparation may involve a multiplicity of actions. 3 RESTATEMENT OF TORTS § 744, Comment *a*, at 631 (1938).

In *Andrew Jergens Co. v. Bonded Products Corp.*, 21 F.2d 419, 423 (2d Cir. 1927), *cert. denied*, 275 U.S. 572 (1928), the Court of Appeals for the Second Circuit stated in relation to an action for trademark infringement:

The issues and the evidence being different, the doctrine of *res adjudicata* can find no place. Even if it were conceded that the case held that what Woodbury was then doing was not calculated to deceive the public into supposing that he was selling plaintiff's facial soap, it is difficult to see how that could be conclusive of the issue whether what he is now doing is so calculated to deceive. It has been frequently said that, in controversies of this character, each case must, in a measure, be a law unto itself.

Applying this principle, a district court in the Southern District of New York held that the dismissal of a prior suit against the defendant was not *res judicata* to an action based on subsequent acts. *John H. Woodbury, Inc. v. William A. Woodbury Corp.*, 23 F.Supp. 162, 167 (S.D.N.Y. 1938). In both these cases, however, one must recognize that the courts are using the term "res judicata" in a broad sense, and are actually referring to collateral estoppel.

In a recent decision by Judge Bryan in the Southern District of New York, *United States v. General Electric Co.*, 358 F.Supp. 731 (S.D.N.Y. 1973), the court explains the principles set forth in the *Lawlor* decision and states at p. 740 "... that a suit based upon a course of wrongful conduct occurring subsequent to the judgment in the prior suit is not based on the same but on a different cause of action." The court continued:

In the case at bar, as in *Lawlor*, the course of conduct complained of occurred subsequent to the judgments in the prior suits. The same public policy considerations against giving a defendant immunity — in fact, perpetual immunity — from liability, for such violations in the future is present here. Here, as in *Lawlor*, while the course of conduct alleged may be a continuing one, the cause of action is not the same but different from that on which the judgments in the 1926 and 1949 actions were rendered.

C. *The Dismissal of the CARROM Trademark Infringement Action on the Ground of Res Judicata is Error*

The District Court disposed of the CARROM trademark infringement action on one sole ground — *res judicata*. [Opinion, p. 17; App. 235]. The District Court erred because it did not distinguish between infringing acts occurring prior to a judgment and infringing acts occurring after a judgment.

*Res judicata* is a sustainable defense only as to acts occurring prior to the judgment or prior to some earlier time for which the judgment speaks. Strictly, a judgment speaks as of the date of commencement of suit, RESTATEMENT OF JUDGEMENTS § 62, Comments *f* and *g* (1942), and not as of its own date.

In any event, however, it is clear that *res judicata* is not a bar to the CARROM trademark infringement action for acts occurring after the prior judgment.

It is also clear that the doctrine of collateral estoppel is inapplicable here, for the prior suit was concluded with a simple dismissal with prejudice and no findings on the merits were made in the prior suit. See *Lawlor v. National*

*Screen Service Corp.*, *supra*.

The judgment below dismissing the CARROM trademark infringement action must be reversed.

To fill out the Court's understanding of the merits of the CARROM trademark infringement action, the trademark CARROM has been held by the Courts of Appeals in both the Second and Seventh Circuits to not be so descriptive of Affiliated's gameboards as to prevent adoption of the term as a trademark. In *Williams v. Mitchell*, 106 F. 168, 171 (7th Cir. 1901), the Court said:

... [W]hile the word "Carrom" may be descriptive of a game at billiards, it is not descriptive of the game in question, and the complainants' board coming to be known by the designation of the "Carrom Board," or the "Carrom Game," the defendants may not rightfully apply that name to their game as a designation or name of the game, although they have a right, as the court below decreed, to use the word in descriptive portions of advertisements so long as they use them in a purely and properly descriptive sense.

In *Ludington Novelty Co. v. Leonard*, 127 F. 155, 157 (2d Cir. 1903), the Court of Appeals for the Second Circuit said:

It is asserted, because the disks, as an incident of the game, strike each other or the cushions and rebound or glance off at an angle, thus, in the broad sense making "carroms," that the word is descriptive of the game. It by no means follows that because carroms occur during the progress of a game, it can be fairly or intelligently described as a carrom game. Carroms, in the broad sense, occur in tennis, hockey, croquet, curling, polo and golf. Even in football carroms of an exceedingly strenuous character are not infrequent. But no one, with the slightest reputation for accuracy, would think of employing the word as descriptive of these or other kindred games. A person who had never seen the complainant's game would form a wholly inadequate conception of its plan and object from the name alone. We are of the opinion that the word "carrom" is not so descriptive of the complainant's game board or the games to be played thereon as to defeat the trade-mark.

Merdel has attacked the trademark CARROM as being descriptive, and has alleged that the word "CARROM" or the phrase "CARROM board" has become generic of gameboards.

Such a position is simply not credible in view of the above quoted decisions, for these decisions are dispositive of whether the word CARROM is so descriptive that it may not be adopted as a trademark. But even if it had been descriptive at the time of adoption, the long continued use of the word CARROM as a trademark since the beginning of this century [Opinion, p. 2 and 4; App. 221, 223] has resulted in secondary meaning and validity of the trademark.

In this connection, *Selchow v. Baker*, 93 N.Y. 59 (1883), amounts to a treatise on trademark law. The meaning of the



term "descriptive" as applied to trademark validity is clearly defined at page 65:

This word was not, in our opinion descriptive of the article. It would not convey to a person who had never seen the toy, and who did not know what it was, any idea of its character, nor would it be an appropriate term to be used by a person desiring to give a correct or any description of it.

The court in *Selchow v. Baker* continued at page 66:

It cannot be true as a general proposition, as contended on the part of the defendants, that when a manufacturer has given to his products a new name invented by himself for the purpose of distinguishing them as his, and the article becomes generally known to the trade and to the public by that name, the name becomes public property and every one has a right to use it. That proposition can be sustained only in respect to names which are descriptive of the article and incapable of being appropriated as trade-marks. The value of a trademark consists in its becoming known to the trade as the mark of the manufacturer who has invented or adopted it, and in being known to the public as the name of an article which has met with popular favor. It cannot be that the very circumstances which give it value, operate at the same time to destroy it.

As to Merdel's allegations that the trademark CARROM is generic, *Feathercombs, Inc. v. Solo Products Corp.*, 306 F.2d 251 (2d Cir. 1962), is dispositive. This decision demonstrates the heavy burden on a defendant who attempts to prove a mark generic, that is, devoid of indication of origin:

In order to become generic the *principal* significance of the word must be its indication of the nature or class of an article, rather than an indication of its origin. (Emphasis in original). 306 F.2d at 256.

The evidence in this case clearly establishes secondary meaning over a long period of time rather than an absence of indication of origin [Pretrial Stipulation, ¶ 4:1 through 4:11; App. 169-81, PX-8 through 8N and PX-9; lengthy exhs. omitted from Exh. Vol. I], particularly since the mark CARROM is recognized as a brand name and enjoys a favorable reputation in the toy and game trade as a source of game products. [PX-11; Exh. Vol. I, pp. 6-24, PX-156; Exh. Vol. I, pp. 296-98, PX-157; Exh. Vol. I, pp. 300-02, PX-152; Exh. Vol. I, p. 293, PX-139A; Exh. Vol. I, pp. 290-91].

As to infringement of the trademark CARROM, there is no doubt that a likelihood of confusion results from Merdel's featured use of the word CAROM in connection with sale of gameboards and other games, such as in the phrase "Carom Board". 15 U.S.C. § 1114(1)(a).

"CARROM" and "CAROM" sound the same and are virtually identical in appearance. Merdel's use of the word "CAROM" as a "symbol to attract public attention" on directly competitive products constitutes an infringement of Affiliated's trademark rights. *Venetianaire Corp. of America v. A & P Import Co.*, 429 F.2d 1079, 1082 (2d Cir. 1970).

It is plain that Merdel did not use the word CAROM, otherwise than as a trademark, only to describe the Merdel goods; on the contrary, a trademark use of "CAROM" by Merdel was both effected and intended. See *Venetianaire, supra* at p. 1082. The advertising of Merdel [PX-22-H; lengthy Exh. omitted from Exh. Vol. I, Pre-trial Stipulation ¶ 6:4 through 6:6; App. 185-86, PX-24 through 24-AV; Exh. Vol. I, pp. 25-83, PX-25A, 25B, 25C; Exh. Vol. I, pp. 84-86, PX-26B, 26C, 26D, 27, 28, 29; Exh. Vol. I, pp. 89-94, PX-34-38, 41; Exh. Vol. I, pp. 101-05, 107, PX-44, 44A,

46A, 48A; Bulky Exhs. omitted from Exh. Vol. I] speaks for itself, and proves without doubt both the effect and the intent.

Such commercial immorality must be stopped, and the judgment below must be reversed.

*D. The District Court Erred in Interpreting the Prior Settlement Agreement*

The District Court misinterpreted the prior settlement agreement between Affiliated and Merdel [PX-4], and consequently failed to find the extensive breaches and disregard of the agreement by Merdel.

Paragraph 2 of the agreement, which is the only section in dispute, reads as follows:

2. The plaintiff [Affiliated] stipulates that it will not object to the use of the words CAROM or CAROMS by defendants [Merdel] where such use is no more prominent than the use on the date of this stipulation. The defendants agree that they will not expand such use for a period of three years from this date. The defendants agree as a part of the foregoing that they will not use the words CAROM or CAROMS during such three-year period to describe their gameboard. At the termination of such three-year period, there shall be no restriction on the use of the words CAROM or CAROMS by the defendants.

This language is straightforward and unambiguous on its face. This language is also consistent with the intent of the parties at the time as expressed by their representatives.

Charles A. Lundstrom, counsel for Merdel and the representative of Merdel who negotiated and executed the settlement agreement, set the stage for the settlement agreement and its interpretation by the following manifestations, neither of which were treated by the District Court.

In the previous litigation, Merdel stated in its Trial Brief [PX-65; Exh. Vol. I, pp. 111-12]:

“Defendant’s utilization of the word ‘carom’ has been much more confined. It has been used by defendant as the equivalent of ‘to hit and rebound’ and to describe a game to be played upon defendant’s ‘100 Play Game Board’. *It has not been used to identify the game board itself*, nor has it been used in defendant’s name.” (Emphasis supplied)

Merdel in the previous suit also stated in open court on the first day of trial [PX-66; Exh. Vol. I, pp. 113-14]:

“We use the word Carom not to describe our board. We call it the Hundred-Play Game Board. We do not use it in the company name. We call the company Merdel. We use it to describe one of the games we play, which we say is in the public domain; and we use it to describe an action involved in that game, which we say is a word generally in the public domain.”

With the stage so set, the litigation was settled the very next day, and Affiliated and Merdel entered into the agreement in question. [PX-4; Exh. Vol. I, pp. 4-5].

Counsel for Affiliated, John D. Pope III, and the person who negotiated and executed the agreement for Affiliated, had a similar understanding. [PX-129; Exh. Vol. I, pp. 212-88, PX-129A; Exh. Vol. I, p. 289].

Paragraph 2 of the agreement consists of two major sections, one a promise by Affiliated and the other a promise by Merdel:

1. *First major promise:* Plaintiff [Affiliated] will not object to the use of the word Carom or Caroms by Merdel where such use is no more prominent than as of the date of the stipulation.

2. *Second major promise:* Merdel agrees not to expand such use for a three-year period.



2(a) *Specific example of second major promise:* Merdel agrees, "as a part of the foregoing" second major promise by Merdel against expansion of use, not to use the word Carom or Caroms during such three-year period to describe its gameboard.

2(b) *Limitation of major promise not to expand use:* The major promise by Merdel expires at the end of three years following March 2, 1967.

The unqualified covenant by Merdel not to use the term Carom to describe its gameboards for a period of three years was clearly considered by the parties who negotiated the agreement to be a *per se* expansion of Merdel's use during the three-year period, and such use was thereby unqualifiedly prohibited for such period. "Describe" of course means "to represent by words".

Since Affiliated's and Merdel's two negotiating representatives did not know of any use by Merdel of the term Carom to describe the Merdel gameboard, as established above, this covenant of Merdel not to use the term Carom or Caroms was total and without restriction or limitation. Such was the clear intent of the parties as the agreement is expressly worded on this point and is consistent with the then existing knowledge of the negotiating parties.

Thus, the clear intent and meaning of the parties was that any use of the term Carom or Caroms to describe Merdel gameboards would be a *per se* expansion of use of the term Carom, and such use was unqualifiedly prohibited for the stated period of three years.

After the present suit was filed, however, Merdel tried to justify its disregard of the agreement by bringing to light some uses of the word CAROM to describe its gameboard which were dated prior to the date of the settlement agreement. With a single exception, [DX S-1 and S-2; Exh.

Vol. II, pp. 55-56], these uses occurred in materials, such as correspondence or invoices, which are not readily available to a competitor or the public view. The negotiating representatives, however, were unaware of even this single exception, [PX-129, ¶ 12; Exh. Vol. I, pp. 214-15, PX-129A; Exh. Vol. I, p. 289, PX-66; Exh. Vol. I, p. 114], and were in fact totally devoid of any knowledge of any prior or then uses by Merdel of the word CAROM or CAROMS to describe the Merdel gameboard.

Merdel came forward with these previously hidden uses in an attempt to twist the unambiguous language of the agreement to a point where the language becomes confusing and almost meaningless.

Based on these previously hidden uses, the District Court erred in several major respects.

The District Court went astray, after previously stating that "the problem is to determine just what sort of description was intended to be prohibited," [Opinion, p. 9; App. 227-28] by then failing to determine the intent of the actual representatives of the parties who negotiated and executed the contract. Since the District Court did not consider the manifestations of the lawyer who both negotiated and executed the agreement on behalf of Merdel, the District Court did not determine a proper construction of the agreement.

The District Court also erred in not observing the hornbook law that a secret or undisclosed intention of a party will not control. 17A C.J.S. *Contracts* § 295, at 66 (1963).

The District Court also erred in holding that the intent of the parties is related to the actual employment of the critical words by Merdel at the date of the stipulation. This would be so only if the parties' negotiating representatives were aware of the actual employment in establishing their

intentions. If the actual employment by Merdel controls, the negotiators were laboring under a mutual mistake of fact, for neither knew of Merdel's hidden activity, and an actual agreement of the parties never came into being. RESTATEMENT OF CONTRACTS, §§ 71 and 501 (1932).

The District Court also failed to recognize that the agreement concerned use of the word CAROM to describe the Merdel gameboard, not its use to describe something other than the Merdel gameboard. This failure to distinguish between uses to describe a game, such as "play carom and crokinole," or an action in the nature of "ricochet" or "glance", and uses to describe a gameboard, such as "Carom Gameboard," pervades the findings below and renders most of them in this connection clearly erroneous.

Affiliated's objection to such uses of "carom" in the prior litigation, even though they were not being used to describe a gameboard, was based on grounds that the uses were featured, the uses constituted a symbol to attract public attention, and the uses were thereby not fair, descriptive uses. See *Venetianaire Corp. of America v. A & P Import Co.*, 429 F.2d 1079, 1082 (2d Cir. 1970).

The prior litigation involved Merdel's employment of the well-known technique of crowding a competitor's trademark, and trading on it, by using it or a similar word in textual material instead of in a prominent trademark position.

Since the settlement agreement, however, as will be pointed out in the next section, Merdel has expanded its unfair competition and has described its gameboard by using the term "Carom" in prominent trademark position preceding the word "gameboard".

The interpretation below of the prior agreement between the parties was clearly erroneous and must be reversed.

E. *The Constant Breach and Disregard of the Agreement by Merdel*

Under the agreement, as pointed out in the preceding section, Merdel could not refer to Merdel gameboards by such descriptions as "Carom Board", "Carom Game Board," "'100 Play' Game Board (Carom-Crokinole)", or "'100 Play' Carom Game Board". [PX-4; Exh. Vol. I, pp. 4-5]. In each of these uses, "Carom" is being used to describe the Merdel gameboard; it is not being used to describe "ricochet" or "glance" or a game such as in "play carom and crokinole". Yet it is these uses of the term "Carom" to describe the Merdel gameboard which are clearly shown in great and apparently deliberate profusion in Merdel's business activities during the three-year period after the agreement.

Even the president of Merdel testified (1) that he understood the agreement to restrict Merdel's usage of the term "Carom board" during the three-year period [Transcript, pp. 289-90, 295; App. 130-31, 135]; and (2) that Merdel had used the term "Carom board" extensively on invoices to customers after March 2, 1967, including such use in early March 1967, immediately after the agreement was signed. [Transcript, pp. 303-04; App. 143].

These breaches in the Merdel invoices of the *per se* prohibition against use by Merdel of the term Carom to describe its gameboard are important and highly material. As invoices confirm to a customer the identification of the product purchased, these are most important breaches which indicate to a customer that the purchased product is a No. 100 Carom gameboard, or "100 Play" Carom board, or No. 100 Play Carom gameboard, to list a few of the blatant uses by Merdel of the term Carom in its invoices to describe its gameboards. [PX-22-H; lengthy Exh. omitted from Exh. Vol. I, Pretrial Stipulation, ¶6:4,



6:5, 6:6; Exh. Vol. I, pp. 185-86]. Such descriptions on invoices are clearly within the terms of the *per se* three-year prohibition against use of the term Carom, for such descriptions tend to assure a customer of his having obtained a genuine article as represented by the trademark or a word confusingly similar to it.

The District Court found that "... there can be no doubt that Merdel continued to use the words in question on their invoices for the entire three-year period." [Opinion, p. 12; App. 230]. But then the District Court disregarded these constant and sustained breaches in the Merdel invoices as not being part of the main promotional activities of Merdel. This action by the Court is certainly not based on the terms of the agreement, and is indeed contrary to the law:

The Trademark Acts give no definition of advertising. It is obvious, however, that the term includes all written and verbal promotions of the goods. This, of course, includes the usual advertisements which appear in newspapers, periodicals, direct mail, and handbills. It also includes such printed matter containing the trademark in the business title, use upon letterheads, checks, *invoices*, mailing labels, store signs, and placards, and counter and store window displays. (Emphasis added). *J. CALIMAFDE, TRADEMARKS AND UNFAIR COMPETITION* § 10.20, at 445 (1970).

In *Pic Design Corp. v. Bearings Specialty Co.*, 317 F.Supp. 326 (D.Mass. 1970), *aff'd*, 436 F.2d 804 (1st Cir. 1971), a description on invoices was specifically held to constitute trademark infringement.

But disregard of the agreement did not stop with invoices.

Merdel added conspicuously "(Carom & Crokinole)" to its game cartons [PX-46A; Bulky Exh. omitted from Exh.

Vol. I] where such was never displayed before (the District Court held this to be a breach even under its interpretation of the agreement [Opinion, p. 13; App. 231-32]), and changed the colors on the front of the carton to highlight the word "Carom" even more. [Compare PX-46A to the previous carton 45A; Bulky Exhs. omitted from Exh. Vol. I]. The ends of the cartons where the addition was made are particularly significant because the gameboard cartons are commonly stacked with only the ends showing in retail store displays.

Extremely significant breaches of the agreement also occurred when Merdel used the term Carom under the heading "Description" in the Merdel price lists for the years 1969 and 1970 to describe its gameboards [PX-26B, 26C, 26D; Exh. Vol. I, pp. 89-91].

Previously only "100 Play' Game Board" had been used to describe the Merdel gameboard on the Merdel price lists [PX-26, 26A; Exh. Vol. I, pp. 87-88].

This use by Merdel on its price lists was not only a *per se* violation of the prohibition against use of Carom to describe its gameboard, but it also was an expansion of use of the term Carom by Merdel, in violation of the more general covenant by Merdel not to expand its use for a period of three years. It is also apparent that this breach was extremely important to both Merdel and to Affiliated, as Merdel's witnesses have testified to the importance of sales literature, including price lists, in the sale of Merdel gameboards. [Trial transcript, pp. 119-21, 278-82, 291; App 124-26, 132].

The importance of this repeated violation by distribution of these price lists with the reworded descriptions in 1969 and 1970 to the game and toy trade cannot be underestimated. Nor can Merdel's intent and ability to reap in

full the benefits from this serious and extensive breach of the agreement be doubted in the least, for use of the word CAROM on the Merdel price lists throughout the game trade is not only a breach of the agreement, but also a serious infringement of Affiliated's trademark CARROM.

These and other activities including public advertising [see, for example, PX-27 through 37; Exh. Vol. I, pp. 92-104] are significant and important "expansions of use", as well as being uses of "Carom" to describe the Merdel gameboard and attract public attention. All of these activities of course were specifically prohibited under the prior agreement.

Merdel did not stop simply with direct breaches. Merdel induced and encouraged others, such as Montgomery Ward and Top Value stamps, in selling Merdel gameboards to the public to use the term "Carom" as a symbol to attract public attention. [Transcript, pp. 309-11; App. 147-49, PX-52; Exh. Vol. I, pp. 108-09, PX-63; Exh. Vol. I, p. 110]. After the agreement was executed, Merdel encouraged two of Merdel's sales agents that it was proper and acceptable to refer to Merdel gameboards as "Carom gameboards". [PX-155; Exh. Vol. I, p. 295, PX-157; Exh. Vol. I, p. 299].

There is, in fact, only a minor amount of customer communication and sales activity by Merdel during the three-year prohibition period which failed to violate paragraph 2 of the agreement, even though it was clearly quite feasible for Merdel to continue to describe its gameboard as "'100 Play' Game Board".

A large and important part of the violations occurred boldly after this suit was filed. Indeed, Merdel issued a letter in January 1970 [PX-24-AK; Exh. Vol. I, p. 72-73], near the end of the prohibited three year period, gloating on the fact that Merdel had "established an identity for our

'100 Play' Carom Game Boards . . .". This is a most serious admission of unfair competition.

Such callous disregard of an agreement cannot be condoned, particularly in the context of whether competition is fair or unfair:

The trade pirate often understands, to some degree at least, the difficulties of showing damage in these cases and knows he can use unfair methods with comparative safety; for although he may be enjoined from continuing his acts, the likelihood of his having to pay any substantial sum is remote. He knows also that it is almost impossible to show the extent to which an unfair device or an infringing trade-mark diverts trade, or the extent of the injury which misrepresentations about a competitor or his goods or business may cause. 2 H. NIMS, *THE LAW OF UNFAIR COMPETITION AND TRADEMARKS* § 419, at 1325 (4th ed. 1947).

"Damage to good will seems by its very nature to be irreparable—it is too intangible an element of damages to be readily made whole after injury." *Pic Design Corp. v. Bearings Specialty Co.*, 317 F.Supp. 326, 328 (D.Mass. 1970), *aff'd*, 436 F.2d 804 (1st Cir. 1971).

In summary, the prior settlement agreement was constantly breached and disregarded by Merdel, and is now unenforceable by Merdel against Affiliated.

*F. The Prior Settlement Agreement is not Enforceable by Merdel and is not a Viable Defense to the Carrom Trademark Infringement Action*

As pointed out earlier, Affiliated and Merdel entered into an agreement dated March 2, 1967, [PX-4; Exh. Vol. I, pp. 4-5], which among other things led to a dismissal of a previous lawsuit between these two parties. At the end of trial, Merdel moved to amend the pleadings to include this



agreement as an affirmative defense to the Carrom trademark infringement action. [Transcript, pp. 357-58; App. 160-161]. Affiliated did not object to the amendment because it had argued all along that it should be pleaded and proved as an affirmative defense, and therefore was not surprised by the late motion to amend.

Since the agreement is a matter of avoidance in regard to the CARROM infringement action, the agreement constitutes an affirmative defense to that action. Rule 8, FEDERAL RULES OF CIVIL PROCEDURE. Technically, it should be pleaded as an estoppel by contract.

For the agreement to be an effective affirmative defense against any part of the CARROM infringement action, the agreement must be enforceable by Merdel. In this regard Merdel has the burden to prove not only an accord but also that they have satisfied that accord. *Colonial Airlines, Inc. v. Janas*, 202 F.2d 914 (2d Cir. 1953); *Reilly v. Barrett*, 220 N.Y. 170, 173, 115 N.E. 453, 454 (1917).

"... [O]ne relying on a contract of compromise and settlement calling for the performance by him of certain acts must show a performance of the conditions imposed on him by such agreement, or a readiness and ability to perform; or he must show a valid excuse on his part for the nonperformance of the conditions thus imposed." 15A C.J.S. *Compromise & Settlement* § 44, at 271-72 (1967); *Whitfield v. Whittington*, 99 A.3d 196 (Del. Ch. 1953); *Frick v. Forbes*, 294 Mich. 375, 293 N.W. 686 (1940); *Kawata v. Barry*, 237 App. Div. 608, 262 N.Y.S. 292 (1933).

Merdel is unable to do so, for Merdel has failed in performance. An affirmative defense based on the settlement agreement is in the nature of an equitable counterclaim for specific performance of the agreement, and Merdel would have to prove all the elements necessary for specific performance in order to prevail on the affirmative defense.

It should be emphasized at this point that the burden is on Merdel to prove performance. It is not the burden of Affiliated to prove lack of performance. It is also the burden of Merdel to prove exactly what part of the infringement action is avoided by the estoppel by contract. The contract does not automatically avoid the entire infringement action; indeed, any activity not specifically permitted is subject to infringement charges, even assuming the contract is enforceable.

The principles involved here were well-established many years ago in *Wood v. Rowe*, 2 Bligh. 595 (1820), which held that an unperformed executory agreement cannot be pleaded in bar to another cause of action. The Lord Chancellor stated at pages 616 and 617:

When the respondent does not insist upon the execution of the agreement, and the appellant does insist upon it, it lies upon the appellant to take the steps necessary to have the agreement performed, and not upon the respondent. That I conceive is also an answer to the plea, and shuts it out from being allowed as a good plea to this bill.

But there is another objection which appears to me important, and which of itself is an answer to this plea, and that is, that it is an executory agreement; it is a ground of action, and I never yet heard that one cause of action could be pleaded in bar against another cause of action. . . .

"It is a well established principle that a party to a contract who commits the first breach of its terms cannot maintain an action for a subsequent breach by the other party." *Kosuga v. Kelly*, 257 F.2d 48, 56 (7th Cir. 1958), *aff'd*, 358 U.S. 516, 79 S.Ct. 429 (1959); *United States v. Lennox Metal Manufacturing Co.*, 131 F.Supp. 717, 728 (E.D.N.Y. 1954), *aff'd*, 225 F.2d 302 (2d Cir. 1955); RESTATEMENT OF CONTRACTS §§ 269, 274, 397 (1932).

Since the District Court found that Merdel had breached the agreement, and since many other breaches have occurred as discussed above, the CARROM infringement action is unaffected by this now unenforceable agreement.

G. *The KIK-IT Trademark Infringement Action was Decided under the Wrong Legal Test*

The District Court erred in its decision denying infringement of Affiliated's trademark KIK-IT [PX-67; Exh. Vol. I, p. 115] and KIKIT [PX-68; Exh. Vol. I, p. 116] by Merdel's use of KICK'ER on directly competitive products. The Court below decided the infringement question on whether actual confusion or actual palming off had been proved. [Opinion, p. 20; App 237].

The Lanham Act, of course, requires proof only of a likelihood of confusion, 15 U.S.C. § 1114(1).

The trademarks here in question, KIK-IT and KIKIT, both enjoy federal registrations [PX-67; Exh. Vol. I, p. 115, PX-68; Exh. Vol. I, p. 116], and neither would convey any idea of the character of the game. See *Selchow v. Baker*, 93 N.Y. 59, 65 (1883). To say that KIK-IT is merely descriptive of a football or a soccer ball is ridiculous; to say that KIK-IT is merely descriptive of a wooden game product on which a game simulating soccer is played is totally absurd. In addition, use of KIKIT began in 1939 [PX-68; Exh. Vol. I, p. 116], the KIK-IT [PX-67; Exh. Vol. 1, p. 115] form being adopted in January 1963. Such long use and advertising [PX-9; Lengthy Exh. omitted from Exh. Vol. I] establishes secondary meaning.

Merdel has defended on the ground that their use of KICK'ER is purely a descriptive use of the word. That position stands without merit, and the finding below [Opinion, p. 20; App. 238] in this regard is clearly erroneous,

because a trademark use of KICK'ER is both intended and effected [see PX-70, 70A; bulky Exhs. omitted from Exh. Vol. I] and KICK'ER with an apostrophe is an obvious attempt to trade on KIK-IT. KICK'ER with an apostrophe cannot be used in a merely descriptive manner for it is not a normal word.

KIK-IT and KICK'ER are so similar in appearance and sound as to create a likelihood of confusion between directly competitive products.

In this regard, Merdel has a burden on entering a directly competitive field to select trademarks far enough away from those already in use to avoid all possible confusion. *Watkins Products, Inc. v. Sunway Fruit Products, Inc.*, 311 F.2d 396 (7th Cir. 1962); *Northam Warren Corp. v. Universal Cosmetic Co.*, 18 F.2d 774 (7th Cir. 1927). Merdel adopted its trademark in 1964 with full knowledge that Affiliated had been using its trademark KIK-IT and KIKIT before that time. [Transcript, pp. 211-15; App. 107-08, PX-150; Exh. Vol. I, p. 292].

Consequently, the judgment concerning dismissal of the KIK-IT and KIKIT trademark infringement actions should be reversed.

#### H. *Copyright Infringement was Denied Because the Court Below Used the Wrong Legal Tests*

In denying Affiliated's claim of copyright infringement, the District Court embarked on a tangent of its own. Merdel had not pleaded any affirmative defenses to the copyright infringement action [Answer to First Amended Complaint; App. 34-41], but the Court found that the copyright infringement action was barred by (1) *res judicata* and (2) statute of limitations. Although both of these defenses had been waived by Merdel, and therefore should not be



considered at all, neither defense would bar the infringement action, assuming that the defense had been placed in issue.

In the prior Michigan litigation, the issue of copyright infringement was not raised by the pleadings and was not an issue at trial. Since copyright infringement arises from a different set of operative facts from trademark infringement, it is not a claim which should have been brought within the meaning of *res judicata*. RESTATEMENT OF JUDGMENTS § 61 (1942).

In addition, as pointed out before, no findings of fact were made in the Michigan litigation, and consequently collateral estoppel cannot apply to the present copyright infringement action.

As to the statute of limitations, which had been waived, the statute, 17 U.S.C. § 115(b), requires commencement of an action within three years after the claim accrued. Since the District Court reasoned that a cause of action occurs only once, even in the case of continuing, successive torts, the District Court did not consider the infringing activity which had occurred within the three-year period prior to commencement of the present action. In this regard, the Court erred, for it is clear that the statute of limitations in copyright cases runs from the date of the last infringing act. *Prather v. Camerarts Publishing Co.*, 176 U.S.P.Q. 68 (N.D.Ill. 1972), *aff'd*, ..... F.2d ....., 179 U.S.P.Q. 452 (7th Cir 1973), *cert denied*, ..... U.S. .... (Dec. 17, 1973); *Baxter v. Curtis Industries, Inc.*, 201 F.Supp. 100 (N.D.Ohio 1962). In the present case, Merdel published and distributed copies of the infringing work throughout the three-year period. [Opinion, p. 21; App. 238].

The most that the statute of limitations could do in the present situation, assuming it had not been waived, was



to preclude recovery for individual infringements occurring prior to three years before the commencement of this action, i.e., March 12, 1966.

The District Court held Affiliated's copyright valid, even though it did confuse trademark and copyright and did say that Affiliated's rule book "is the subject of a valid 1945 trademark." [Opinion, p. 21; App. 239].

Specifically, the District Court held that Merdel had used Affiliated's copyrighted rule book in preparing its own version [Opinion, pp. 23-24; App. 239-40]. Indeed, the man who prepared Merdel's rule book [PX-101; Exh. Vol. I, pp. 154-86] has testified that he used as reference material Affiliated's copyrighted rule book. [PX-100; Exh. Vol. I, pp. 121-153]. [Transcript, pp. 316-25; App. 150-53]. These two rule books are used commercially in connection with sale of competitive gameboards. [Opinion, pp. 3, 21; App. 222, 238].

It should be pointed out that access, and inferences based thereon to establish the fact of copying, are not necessary elements for consideration, once actual use of the copyrighted work is established, as it is here.

The District Court, in spite of its finding of actual use of the copyrighted work in preparation of Merdel's version, excused the copying on ground that Merdel attempted to improve the substance and style in its version. [Opinion, p. 23; App. 241].

Contrary to the District Court's conclusion below of non-infringement based on an "attempt-to-improve-the-version" theory, the Copyright Statute gives the copyright owner the exclusive right to make "any other version" of the copyrighted work. 17 U.S.C. § 1(b).

The proper test for infringement is set forth in *West*

*Pub. Co. v. Lawyers' Co-operative Pub. Co.*, 79 F. 756, 762 (2d Cir. 1897):

... [I]t is not the law that a copyrighted syllabus can be infringed only by a reproduction of its original language. *It is the unfair appropriation of the labor of the original compiler that constitutes the offense.* Identity of language will often prove that the offense was committed, but it is not the sole *proof*; and, *when the offense is proved, relief will be afforded, irrespective of any similarity of language.* For example, if, in a case like this, defendant's editors should one and all testify that they made up their digest from complainant's syllabi, so as to save the time and trouble necessarily involved in an independent examination of each opinion, there can be no doubt that such digest would be held to infringe, although the work were so cleverly done that no identity of language could be found in a single paragraph. It is necessary, therefore, to see how far complainant has made out its contention that this was precisely what defendant's editors did. (Emphasis supplied).

*Orgel v. Clark Boardman Co.*, 301 F.2d 119 (2d Cir. 1962), reaffirms this law.

A holding of infringement based on this proper legal test and the findings below is required. The fact that the "improved version" of Merdel concerns expression rather than simply an idea is clearly demonstrated by Merdel's own action in getting a copyright on its infringing rule book [PX-101; Exh. Vol. I, pp. 154-186] and by the testimony at trial of Merdel's author of its rule book [Transcript, pp. 317-18, 324-25; App. 151-53].

The essence of Merdel's author's testimony in this respect is that the manner of expression of rules for many games in Affiliated's copyrighted rule book was considered less than desirable by him and that in his opinion he substan-

tially changed this manner of expression, particularly referring to the manner in which Affiliated's rule book was presented and organized. As noted in the comparative analysis in the attached Addendum I, however, even this "improvement" in the manner of presentation or expression was in fact present in several of the original and copyrighted sets of game rules in plaintiff's copyrighted work. Merdel's improvement, in which Merdel expressed pride, was based on appropriation of Affiliated's earlier copyrighted work.

Further, a holding of intentional infringement by Merdel is compelled since Merdel's then president was the author of Affiliated's copyrighted rule book (Merdel clearly had notice) and since Merdel's copying was so slavish at some points that even Affiliated's unusual copyright notice involving the word "copyrighted" was copied into the Merdel rule book. [verso pages of PX-100; Exh. Vol. I, p. 122 and PX-101; Exh. Vol. I, p. 155].

The judgment below must be reversed.

Attached as Addendum I is an analysis clearly demonstrating the comprehensive infringement and appropriation of Affiliated's copyrighted work for use in direct competition with Affiliated.

Affiliated's copyrighted rule book [PX-100; Exh. Vol. I, pp. 121-153] includes almost sixty pages of printed text and includes illustrative drawings. Against this background the District Court relied on the treatise M. NIMMER, NIMMER ON COPYRIGHT, § 37.83 (1973); *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967); and *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971), as requiring a showing to establish infringement of a literal or closely paraphrased copy. The Court below simply misunderstood these authorities.

The NIMMER reference concerns the copyrightability of instructions not the legal test for infringement, particularly where actual use and copying of the copyrighted work is shown. NIMMER discusses the test of infringement in Chapter 12, beginning at § 141.

The *Morrissey* case cited by the District Court involved instructions in a sales promotion contest. The instructions were quoted by the court at page 678 as follows:

"1. Entrants should print name, address and social security number on a boxtop, or a plain paper. Entries must be accompanied by \* \* \* boxtop or by plain paper on which the name \* \* \* is copied from any source. Official rules are explained on \* \* \* packages or leaflets obtained from dealer. If you do not have a social security number you may use the name and number of any member of your immediate family living with you. Only the person named on the entry will be deemed an entrant and may qualify for prize.

"Use the correct social security number belonging to the person named on entry \* \* \* wrong number will be disqualified."

The court then concluded at page 678 ". . . to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance." The court's conclusion is in error, of course, for copyright is only a right against copying from the copyrighted work itself; it by definition does not and cannot exhaust all possibilities of future use of the substance by other uncopied works incorporating the substance. The *Morrissey* court seems to have applied some mistaken concept of copyright monopoly whether or not copying occurs, and this is not and never has been the law of copyright.

This defect in the *Morrissey* case is pointed out by Judge



Wyatt in *Time, Inc. v. Bernard Geis Associates*, 293 F.Supp. 130, 143 (S.D.N.Y. 1968):

It is said for defendants that aside from all else the Zapruder pictures could not be copyrighted because of the "doctrine" of a recent decision, *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967). This "doctrine" is here invoked to avoid an "oligopoly of the facts of the assassination of President Kennedy."

....

Such a decision can have no possible application here. Life claims no copyright in the events at Dallas. They can be freely set forth in speech, in books, in pictures, in music, and in every other form of expression. All that Life claims is a copyright in the particular form of expression of the Zapruder film. If this be "oligopoly", it is specifically conferred by the Copyright Act and for any relief address must be to the Congress and not to this Court.

This holding by Judge Wyatt in the *Time* case is directly apropos and applicable in this case. Affiliated claims copyright in the particular manner of expression or presentation of its rule book and Merdel has infringed this copyright by extensively copying and appropriating from Affiliated's prior work.

The other case cited by the District Court, *Herbert Rosenthal Jewelry Co. v. Kalpakian*, *supra*, is inapplicable to the present case for it concerns a situation where the accused infringer denied copying rather than admitting it, and any inference based on substantial similarity was not persuasive based on the similarity of idea rather than expression.

A recent decision in this jurisdiction, *Consolidated Music Publishers, Inc. v. Hansen Publications, Inc.*, 339 F.Supp. 1161 (S.D.N.Y. 1972), is very similar to the facts in the

present case, although copying was not admitted. This decision involved an instrument book for playing a rhythm guitar. Despite extensive changes in the text and manner of expression, the court found that enough similarity existed to justify an inference of copying. In the present case, of course, copying is admitted.


The dismissal of the copyright infringement action must be reversed.

## V. CONCLUSION

Affiliated requests the following relief:

- (1) that the dismissal of its CARROM trademark infringement action be reversed;
- (2) that its CARROM trademark be held valid and infringed, and that its action be remanded for an accounting and issuance of an injunction against further infringement;
- (3) that the prior settlement agreement between Affiliated and Merdel be held unenforceable;
- (4) that the dismissal of its KIK-IT and KIKIT trademark infringement actions be reversed;
- (5) that the trademarks KIK-IT and KIKIT be held valid and infringed, and that these actions be remanded for an accounting and issuance of an injunction against further infringement;
- (6) that the dismissal of Affiliated's copyright infringement action be reversed; and
- (7) that Affiliated's copyright be held valid and infringed, and that this action be remanded for an accounting and issuance of an injunction against further infringement.

Respectfully submitted,

  
.....  
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**CERTIFICATE OF SERVICE**

I certify that two (2) copies of the foregoing Brief were mailed to John D. Tully, One Vandenberg Center, Grand Rapids, Michigan 49502, counsel for Merdel Game Manufacturing Company, Wm. Richman Associates, Ltd., and Bernard Cahn, this 19..... day of August, 1974.

*Alan T. Bane*.....



**ADDENDUM I**  
**Discussion and Analysis**  
**of**  
**Copyright Infringement**

In manner of presentation and expression, the Merdel rule book (PX-101; Exh. Vol. I, pp. 154-86) clearly results from copying the Affiliated rule book (PX-100; Exh. Vol. I, pp. 121-153).

To begin with, the external covers of both books are quite similar in several respects, so as to give an initial impression of similarity. Thus, the front cover of each book includes (1) a picture of family members playing a game about a diagonally viewed gameboard; (2) the words "Rules for Games" followed by the name of the gameboard; and (3) the name of the manufacturing company at the bottom of the page. The back cover of both rule books also follows the same pattern of presentation: a picture of a revolving floor stand and the name of the company at the end of the page.

Another striking identity is found on the inside pages of the front covers. Both rule books display the copyright notice with the word "*copyrighted*" followed by the name of the company, the address, and country. The usual practice in copyright notices is to use the word "copyright", not "copyrighted", and normally no reference to country is made.

The cover similarities of appearance, however, are themselves relatively small as compared to the internal similarities which permeate the entirety of these two books.

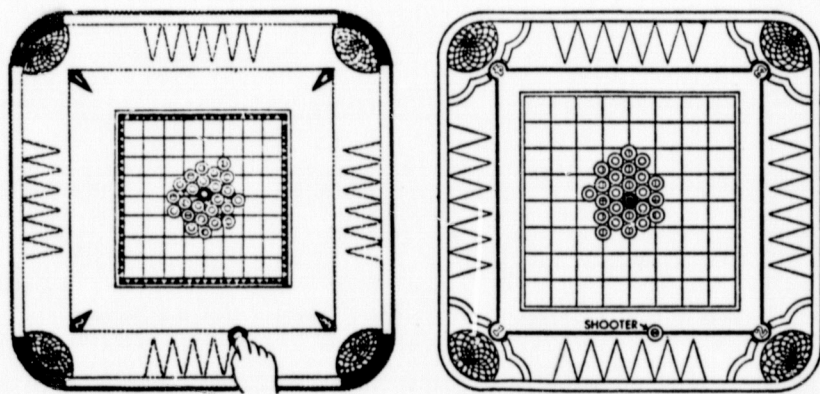
Obvious copying and appropriation occur in the interior presentation of the Merdel rule book, in both the wording and pictorial illustrations. The pictorial illustrations will be discussed first.

Similarity of pictorial presentation manifests itself in at least eight areas: 1) the arbitrary selection of the same five corresponding sets of game rules for pictorial illustrations of manner of play (with the single exception of the picture of the hand with the cue stick on page 1 of the Merdel rule book); 2) groupings of rings placed on the gameboard; 3) detailed artistic design of pocket nets; 4) angle of view chosen; 5) general presentation and positioning of gameboard elements; 6) placement of shooting pieces; 7) graphic representation and positioning of hands.

**The Arbitrary Selection of the Same Five Corresponding Sets of Game Rules for Pictorial Illustrations of Manner of Play**

On page 7 of the Affiliated rule book (PX-100; Exh. Vol. I, p. 124), an illustration in plan view of the gameboard with nets, playing rings, and shooting rings appears, having been arbitrarily chosen to convey the gameboard at the beginning of play. The Merdel rule book (PX-101; Exh. Vol. I, p. 156) has a corresponding game entitled "Ring Carom" at pages 2-3, which also portrays the gameboard pictorially.

Fig. 1



The above is merely one example of the five arbitrary selections of graphic presentation in the Affiliated book which have been copied and appropriated in the Merdel book.

### **Groupings of Rings Placed on the Gameboard**

The author of the Merdel book has attempted to disguise his copying of the Affiliated illustrations, but his efforts in this regard, once noted, merely make the blatant copying and purposeful appropriation more apparent and reprehensible. In this respect, initially it might appear that the playing rings in the center of the gameboard illustrations on pages 7 and 2 of the two rule books (See Fig. 1) are quite dissimilar. However, inverting either the Affiliated rule book or the Merdel rule book and thus viewing the ring groupings upside-down makes the almost exact copying of the central grouping of rings strikingly apparent. The ring-for-ring correspondence is shown by the color coding of the corresponding rings in the two groupings in Affiliated's rule book comparison exhibit (PX-103; lengthy Exh. omitted from Exh. Vol. I) under the heading "Drawings".

Thus, not only the showing of a center grouping is copied, but also the particular arbitrary grouping is copied, with an attempt having been made to disguise the copying.

A further similarity is also present in the positioning of the rings in the illustrations on page 24 (Exh. Vol. I, p. 133) of Affiliated and page 24 (Exh. Vol. I, p. 167) of Merdel. This similarity involves the mirror reversal of the rings, as shown by color coding of the rings on the respective two comparison drawings in Exhibit 103. While the rings are not exactly positioned in the mirror image view, the almost identical placement of the shooter and five of the six rings, leaves no room for doubt as to the disguised copying of Affiliated's arbitrary artistic presentation.

### **Detailed Artistic Design of Pocket Nets**

While there are many ways to artistically represent a corner net or pocket, the Affiliated rule book illustrations present an artistic manner of so doing through the medium of plural intersecting smooth arcs. Such an arbitrary and artistic manner of illustration of a net is totally unique and original to the Affiliated rule book, nets having been previously illustrated in various other manners such as by crooked or straight line segments intersecting at random and in various realistic or unrealistic designs, as shown for instance on the Merdel 100 Play gameboard cartons (PX 45-A and 46-A; Bulky exhs. omitted from Exh. Vol. I), the prior Affiliated rule book (DX-V, pp. 14, 21, 33, and 35; Exh. Vol. II, pp. 113, 116, 122-23), and the drawings in U.S. Patent No. 709,634 (DX T-1; omitted from Exh. Vol. II), and U.S. Patent No. 2,180,439 (DX T-8; Exh. Vol. II, p. 87).

Merdel has not employed any of these other readily available artistic presentations of a net, nor has Merdel contributed a new manner of presentation. On the contrary, Merdel has copied and appropriated precisely the original and artistic manner of expression in the Affiliated book, depicting a net with plural intersecting smooth arcs. (See the "drawings" comparison section of PX-103; lengthy Exh. omitted from Exh. Vol. I)

### **Angle of View Chosen**

In all of the drawings that illustrate a gameboard from a plan view in the Affiliated rule book (pp. 7, 16, 24; Exh. Vol. I, pp. 124, 129, 133), the same arbitrary artistic angle of view is used in corresponding drawings in the Merdel rule book (pp. 2, 5 and 24; Exh. Vol. I, pp. 156-57, 167). The angle of view for ten pins in the Affiliated rule book (p. 28; Exh. Vol. I, p. 135) which places the viewer approximately 30° above the surface of the board facing only the



single corner section is also used in the counterpart drawing in the Merdel rule book (p. 34; Exh. Vol. I, p. 172).

### **General Presentation and Positioning of Gameboard Elements**

In addition, the general presentation and positioning of the gameboard elements in the drawing on page 28 (Exh. Vol. I, p. 135) of the Affiliated rule book is clearly appropriated item-by-item in the Merdel rule book on page 34 (Exh. Vol. I, p. 172).

One should note (1) the corner wrap-around upstanding fence behind the net so as to form a "backstop"; (2) the employment of the word BACKSTOP to designate the cardboard corner fence; (3) the artistic manner of accentuating the fence "backstop" with grey shadowing; (4) the arcuate 3-dimensional manner of printing the arbitrary word "BACKSTOP" on the grey-toned fence; (5) the instructional wording (i.e., "CUT BACKSTOP OUT OF CARDBOARD" in the Affiliated book, and "CARDBOARD BACKSTOP CUT OUT AS ABOVE" in the Merdel book; (6) the T-shaped flat outline view of the fence "backstop"; (7) the placement of dimensions on the flat outline view of the backstop directly above the corner section and fence "backstop" display.

### **Placement of Shooting Pieces**

In three of the five drawings having counterparts in both rule books, shooters are depicted. In all three cases (Affiliated book pp. 7, 16, 24; Exh. Vol. I, pp. 124, 129, 133, and Merdel book pp. 2, 5, and 24; Exh. Vol. I, pp. 156-57, 167), the placement of the shooter in the Affiliated book at an arbitrary place on the shooting line is almost identically copied in the Merdel rule book, whereas any placement

location on the shooting line would be in accord with the game play for the particular game associated with the drawing.

### **Graphic Representation and Positioning of Hands**

The graphic design of hands throughout the corresponding drawings is strikingly similar. On page 6 (Exh. Vol. I, p. 124) of the Affiliated rule book and page 1 (Exh. Vol. I, p. 155) of the Merdel rule book, the purpose of the corresponding drawings is to aid in illustrating the written descriptive instructions on how to shoot the rings. In both rule books the hand is shown in outline form from an oblique side angle, the fourth finger bent and poised to shoot, and the *three* remaining *fingers extended*, as distinguished from an alternative conventionally employed manner of shooting in which the fist is closed.

While this fact is similarity alone might be argued to merely reflect the best position preparatory to shooting, the argument fails when it is noted that in each *plan view* gameboard representation used in the Affiliated rule book where a player's hand is shown, the shooting hand is illustrated with hand poised in a *closed fist* form (see Affiliated book, p. 24; Exh. Vol. I, p. 133), and this same closed fist preparatory shooting position presentation is copied in the Merdel rule book in each use in conjunction with a plan view of the gameboard (see Merdel book, pp. 2 and 5; Exh. Vol. I, pp. 156-57). Merdel has attempted to disguise this by omitting the hand representation (Merdel book, p. 24; Exh. Vol. I, p. 167) where the corresponding plan view in the Affiliated rule book shows a hand (Affiliated book, p. 24; Exh. Vol. I, p. 133), and by including a hand (Merdel book, pp. 2 and 5; Exh. Vol. I, pp. 156-57) where the Affiliated rule book omits a hand (Affiliated book, pp. 7 and 16; Exh. Vol. I, pp. 124, 129). This is certainly not

merely a coincidence, but in fact represents an attempt to carefully camouflage the purposeful appropriation of this portion of Affiliated's copyrighted illustrations.

Apart from pictorial copying there is further extensive copying from the Affiliated rule book in 1) organization and 2) linguistic expression in the Merdel rule book.

### **Organization**

In some cases, the exact order in which similar games appear in the rule books has been copied, and in many other cases, essentially the same order has been copied. An example of such a similarity is shown in the order of presentation of a group of games related to checkers. The arbitrary order of sequence of these games appearing in the Affiliated rule book has been copied and appropriated in the Merdel rule book. There is no apparent logic to this order of presentation, such being an arbitrary pattern of this grouping of game rules *original* to *this* Affiliated rule book, which has been appropriated in the Merdel rule book.

Other examples of similarity in the order of presentation are shown in the color-coded form in the "organization" section of the comparison book (PX-103; lengthy Exh. omitted from Exh. Vol. I), the large number of exact copyings of groupings being striking. In relatively few instances, a reversal of one or two games in a group has been made in the Merdel rule book, and such is indicated by a curved arrow showing the displaced position.

### **Linguistic Expression**

Further evidence of appropriation is the copying of the Affiliated rule book's linguistic expression of rules to individual corresponding games. Linguistic expression may be

subdivided into a) format, b) sequence of sentences, c) structure of sentences, d) unusual words. The color-coded comparison book (PX-103; lengthy Exh. omitted from Exh. Vol. I) shows graphically the various aspects of linguistic expression appropriated by Merdel from Affiliated's rule book. The following analysis will include only a few examples from the Affiliated and Merdel rule books.

#### a) *Format*

The *format* used in the game entitled "Clock-O" (Affiliated book pp. 55-57; Exh. Vol. I, pp. 148-149) is characterized by the use of specific section headings in a specific order. It is comprised as follows: (1) the side of the board to be played on constitutes the first instruction; (2) equipment used is designated by the section heading: "Equipment needed"; (3) the purpose of the game is designated by the heading "Object of the Game"; under the heading "Rules", a numerical listing of instructions is laid out. The similar game in the Merdel rule book at p. 51 (Exh. Vol. I, p. 180) is entitled "Minutes and Hours", and follows substantially the *same format*: (1) the side of the board to be played on; (2) a section entitled "Equipment"; (3) a section entitled "Object of the Game," and (4) finally a section heading "The Game," followed by instructions. The format copied from the Affiliated rule book game of "Clock-O" (pp. 55-57; Exh. Vol. I, pp. 148-49) and embodied in the Merdel rule book game entitled "Minutes and Hours" (p. 51; Exh. Vol. I, p. 180) is used in 60 out of 100 Merdel listed games, and in 42 Merdel listed games out of the 69 games for which there are rules for corresponding games in the Affiliated rule book.

#### b) *Sequence of Sentences*

The similarity in the sequence of sentences in both rule books is illustrated by an analysis of the counterpart games



"Shooting the Wild Ducks," p. 11 (Exh. Vol. I, p. 126) in the Affiliated rule book, and "Pursuit," p. 14 (Exh. Vol. I, p. 162) in the Merdel rule book. Color-coding in the comparison book (PX-103; lengthy exh. omitted from Exh. Vol. I) reveals the duplication; starting with the yellow delineation going through to the brown, the order of presentation of the sentences in analogous; the order of remaining similar sentences, green through red in the Affiliated rule book, is merely reversed in the Merdel rule book—red through green. As previously noted, this type of ~~an~~ similarity in the sequence of sentences which occurs throughout the Merdel rule book as compared to the Affiliated rule book defies the simple explanation of logical relationships.

c) *Structure of Sentences*

Appropriation of sentence structure might not appear striking in the analysis of individual sentences; however, a side-by-side examination of the Affiliated and Merdel rule books will reveal, as indicated by the color-coding in the comparison book (PX-103; lengthy exh. omitted from Exh. Vol. I), a strong pattern throughout the Merdel rule book of sentence structures similar to that used in the Affiliated rule book. The equivalence between similar games in sequence and structure of sentences usually begins after "The game" section heading in the Merdel rule book. On the following several pages is a side-by-side comparison display of the rules for several corresponding games from the Affiliated and Merdel rule books, which will best illustrate the striking extent of sentence structure similarity. Underlining has been added to point up various aspects of exact or paraphrase approximation.

**Affiliated Rule Book**  
**DISPLACEMENT**

**Merdel Rule Book**  
**STRAIGHT SHOOTING**  
Played on the checker side of  
the board.

Equipment: 4 green rings, 3 red rings, one white Shooting Ring.

Object of the Game: To shoot 4 green rings off a straight line without touching 3 red rings placed in between the green.

Place 4 red rings and 3 green rings on the line 3-4 evenly spaced so you have alternately a red and then a green, etc.

Always shoot from the line 1-2 and try to merely displace the red rings without touching or in any way moving a green ring.

Turn is lost by missing or disturbing a green ring.

Game is 5 turns for each player

Set up anew for each turn or if one player gets all 4.

#### **Affiliated Rule Book** **KEEP A DATE**

This game is played on the clock-dial circles, and the object of the

The Game: Place 4 green and 3 red rings alternately and evenly spaced on the straight line running between the No. 1 and No. 2 pockets.

From any point on the line 3-4 on the opposite side of the board a player shoots the Shooting Ring in attempt to move the green rings off the line without touching or moving the red rings. Each shot is made from the base or shooting line.

A player loses his turn when he hits or disturbs a red ring or fails to move a green.

The line of rings is re-set after each turn.

SCORE: The player moving the most green rings in 5 turns is the winner.

#### **Merdel Rule Book** **RENDEZVOUS**

Played on the Crokinole side of the board.

Equipment: Pair of dice, one green and one red ring, two white rings.

Object of the Game: To start from different points on the

*game is for the two players to "get together", thus "Keeping A date" with each other at a specified hour. The player who succeeds in keeping the date is, of course, declared the winner.*

*Equipment Needed: One red ring, one green ring, one yellow and one of the small green markers, and one of the dice.*

*Each player places his ring on any hour circle he may wish, and leaves the ring there. This represents the time set by each player, at which the date is to be kept.*

*The players take turn rolling the dice, and beginning with the 12 o'clock position in the clock dial circle, will move clockwise with the small marker in an endeavor to stop on the circle occupied by the opponent's ring.*

*If the player rolls a number that places him on the same circle as the one occupied by the opponent's ring, then he has kept the date and wins the game.*

*If a player rolls a number that would place his small marker on the space occupied by his ring, then he places the small marker on top of the ring and on subsequent throws moves both markers together, as a unit, thus*

*outer circle and try to rendezvous, meet one another, through the rolling of the dice.*

*The Game: Using the outer circle as the face of a clock (refer to the game Minutes and Hours) each player places his ring on any "hour spot", representing the player's designated point of rendezvous.*

*The first player rolls the dice and moves the disk clockwise from his rendezvous point in accordance with the total minutes registered by the dice. For example, if an 8 is rolled on the dice, the player moves his ring ten minutes (to the closest five minutes).*

*Each player has a turn rolling the dice.*

*The player whose roll of the dice allows him to move on the spot occupied by his opponent's ring wins the game.*

changing the time of the "date", but the other player must remain in the position originally selected, unless he, also, covers his ring with the small marker, in which case he also moves them both, together.

Whether moving single or double units, the players continue until one catches up with the other, and this ends the game.

### **Affiliated Rule Book**

#### **SHOOTING THE WILD DUCKS**

*Played on the Carrom Side of Board.*

Two persons can play this game.

*Use six rings of different colors and a red shooter.*

*Three green rings are to be placed in the wide part or base of the Backgammon spots, beginning with the first Backgammon spot to your right. Leaving one Backgammon spot vacant you place another colored ring on the third Backgammon spot from the right and another ring on the fifth Backgammon spot from your right.*

### **Merdel Rule Book**

#### **PURSUIT**

*Played on the checker side of the board.*

*Equipment: 3 green rings, 3 red rings, one white Shooting Ring.*

*Object of the Game: To pocket three rings placed on the backgammon (triangle) spots, the player being required to call the ring he expects to pocket and to continue to shoot at no other ring until the called ring is pocketed.*

*The Game: Each player places three rings of a color on alternating tips of the backgammon (triangle) spots on the side opposite from where he is playing.*



The player on the opposite side places his three rings in a similar way, beginning with his right hand spot.

*His colors for rings must be different from his opponent's.*

Having placed the rings you call a certain ring and seek to pocket it.

If you succeed you shoot again.

*If you fail your opponent chooses a color and seeks to pocket it.*

*In your next turn you must continue to chase the colored ring you named, and can shoot at no other until it is pocketed.*

*Rings displaced remain where they stop.*

*Rings other than those named going into a pocket are to be placed on the Backgammon spots beginning with the vacant one nearest the right hand.*

*If a shooter goes off the board or in a pocket the person loses his turn and forfeits any men pocketed by the shot.*

One side may use the three lighter colors and the opposite side the three darker colors to distinguish sides.

*The color of the rings of each player should differ.*

One Shooting Ring is used and the first player shoots from any point on his base line at one ring which he selects to pocket.

*A missed shot permits the opposing player to shoot at one of his colored rings which he selects to pocket.*

*A player must continue play on the selected ring before he can play another ring.*

*The player who first pockets his three rings is the winner.*

*If the Shooting Ring is pocketed the player loses his turn.*

*If a ring other than the selected ring is pocketed, it is placed on the backgammon spot.*

*Rings moved from their spots during play remain where they lie.*

*The player who first pockets all his men wins the game or the score if three rounds are played.*

NOTE — This game may be played by placing the rings on the points of the Backgammon spots instead of the base if so preferred. This makes the game somewhat easier.

#### d) *Unusual Words*

The presence and distinctive use of one particularly unusual and arbitrary word "spot", in "Shooting the Wild Ducks" and "Pursuit", further evidences substantial copying from the Affiliated rule book. In the Affiliated rule book's "Shooting the Wild Ducks", "spot" is modified by the word "Backgammon", both words in conjunction denoting a particular location on the board. As a general rule, this location is indicated in "Backgammon" game rules as a "point" or "triangle" rather than a "spot" (refer to "Backgammon", pp. 30-34 (Exh. Vol. I, pp. 136-38) in the Affiliated rule book). As used in "Shooting the Wild Ducks", the arbitrary expression "spot" also appears in the Merdel rule book's "Pursuit" to denote the same location, clearly implying appropriation of the manner of expression employed in the Affiliated rule book.

While many more examples of appropriation by the Merdel rule book from the copyrighted Affiliated rule book may be shown, as apparent from the lengthy comparison embodied in PX-103, it is believed that the foregoing discussion will adequately serve to point out the extensive appropriation by the Defendant Merdel of Plaintiff's copyrighted rule book and the fruits of Affiliated's labors, as embodied in its copyrighted rule book.